

were claims of liens, the nature, the dates of creation, and the possible priorities of such liens are not stated. How the bankruptcy of the debtor might affect them cannot be determined. It does not appear whether the owners of these claims were made parties to the proceeding from which the appeal was taken, or whether they had notice of it.

We are told that the bankrupt answered in the state court action and prayed that the fund be applied in payment of bonds and coupons, but the date when this occurred is not given.

It is not clear whether the only question before the state court was one of law, namely, the construction of a clause of the deed of trust, or whether there were other questions of law or fact involved. It is disclosed that the guarantor of the bonds, although a defendant in the state court, was not made a party in the bankruptcy proceeding, was refused a hearing therein, and is one of the appellants.

Inasmuch as the summary jurisdiction of the district court is challenged, any of these features of the case may have an important bearing upon a correct decision. To answer the questions as framed would, in view of what is omitted from them, though brought to our notice by the statement of facts, lead rather to misunderstanding and confusion than to the clarification of applicable rules of law.

The certificate will be

Dismissed.

NEW JERSEY *v.* NEW YORK ET AL.

No. 16, original. Argued April 13, 14, 15, 1931.—Decided May 4, 1931.

The State of New Jersey sued the State of New York and the City of New York to enjoin them from diverting water from non-navigable tributaries of the Delaware for the purpose of increasing

the water supply of the City. Pennsylvania intervened to protect her interest in the river. *Held*:

1. The case is not governed by a strict application of the common law rules of private riparian rights, but by the principle of equitable apportionment applicable between the States of the Union. P. 342.

2. The mere fact that the proposed diversion is to another watershed is not a bar. P. 343.

3. The objection that the proposed diversion will interfere with the navigability of the river is met, for the purposes of this case, by proof that navigability will not be impaired. P. 344.

4. The diversion, however, must remain subject to the paramount authority of Congress, and the powers of the Secretary of War and the Chief of Engineers of the Army, in respect of navigation and navigable waters of the United States. *Id.*

5. Subject to qualifications mentioned *infra*, the proposed diversion is reasonably necessary to New York, and not arbitrary or beyond the freedom of choice that must be left to that State. *Id.*

6. The possibility that the diversion may limit development of water power in New Jersey under future plans for damming the river, which would need the consent of Congress and of New York and Pennsylvania, is not such a showing of present interest as entitles New Jersey to relief. P. 345.

7. The diversion from the tributaries of the amount proposed by New York will not materially affect the sanitary condition of the river, its industrial and agricultural uses, its use as a source of municipal water supply, or its shad fisheries. *Id.*

8. But it is necessary that the diversion should be curtailed and regulated, and be accompanied by sanitary treatment of sewage entering the stream in New York, in order to prevent injury to the use and reputation of the river for recreational purposes in New Jersey, and in order to avoid an increase of salinity in the lower river and in Delaware Bay which would injure the oyster industry there. *Id.*

9. The diversion, as limited by the decree, shall not constitute a prior appropriation or give the defendant State and City any superiority of right over the other two States in the enjoyment and use of the river and its tributaries. P. 347.

10. The prayers of Pennsylvania for a present allocation of water to it and for appointment of a river master, are denied without prejudice. *Id.*

11. The Court retains jurisdiction to make future orders and modifications. P. 348.

HEARING on exceptions to the report of the Special Master, in a suit by New Jersey to enjoin diversion of water, in New York, from tributaries of the Delaware River. The State of New York and the City of New York were the defendants. Pennsylvania became a party by intervention. See 280 U. S. 528, 533; *post*, p. 805.

Messrs. Duane E. Minard, Assistant Attorney General of New Jersey, and *James M. Beck*, with whom *Messrs. William A. Stevens*, Attorney General, and *George S. Hobart* were on the brief, for plaintiff.

The common law rule of riparian rights is applicable to this case for the following reasons:

(a) That rule is in effect in all three States and none of them has passed any statute authorizing the proposed diversion.

(b) The proposed diversion will cause substantial damage to the plaintiff and its citizens.

(c) The defendant city has suitable and adequate sources of water supply within its natural watershed which can be used without injury to the plaintiff and its citizens.

There is no necessity for the proposed diversion; at most it is merely a matter of convenience, which is insufficient to justify a diversion from a foreign watershed in which other States have natural rights that would be substantially damaged thereby.

The proposed diversion will substantially affect the navigation in, and the navigable capacity of, the Delaware River and of the tributaries in question; and the defendant city has not complied with the conditions precedent prescribed by Congress.

The proposed diversion will cause substantial damage to the plaintiff and its citizens by impairing property rights

that are dependent upon the existence of water power appurtenant to their riparian lands.

The proposed diversion will cause substantial damage to the plaintiff and its citizens by increasing the hardness of the water used and usable for industrial purposes, and thereby impair the present and future industrial development of the plaintiff's territory and depreciate the value of the lands of the plaintiff and its citizens.

It will cause substantial damage with respect to use and value for recreation; to the oyster industry; to fish; to agriculture; and from the standpoint of sanitation and water supply.

If the defendant city be entitled to divert waters from the tributaries in question, it should be required to do so in the manner that will cause the least damage to the plaintiff and its citizens.

The conclusion of the Special Master that substantial damage to the plaintiff and its citizens could be removed by reducing the volume of the diversion proposed by New York and by modifying the plan of release from impounding reservoirs during periods of low flow, was not within the issues raised by the pleadings and is unsupported by any evidence.

The decree should be final.

Mr. Thomas Penney, Jr., Special Assistant Attorney General of New York, with whom *Mr. John J. Bennett, Jr.*, Attorney General, was on the brief, for the defendant State of New York.

The doctrine of riparian rights does not apply.

The Master's limit on quantity of diversion unduly restricts future needs. The question of taking in excess of 600 m. g. d. is not before this Court.

The probable basis for the Master's reduction of the proposed diversion from 600 m. g. d. to 440 m. g. d. was present need rather than damages.

The findings of damage by the Special Master were not supported by competent evidence, nor the weight thereof, nor of the magnitude required by this Court before it will grant an injunction in a suit of this kind.

The operation of the plan would not produce any adverse effect upon any interest of plaintiff or its citizens.

Totaling diverse damages is an erroneous principle.

The decree should be final and not subject to modification.

Mr. Arthur J. W. Hilly, Corporation Counsel of the City of New York, with whom *Messrs. J. Joseph Lilly, Frank H. Deal, Frank J. Coyle*, and *David C. Broderick* were on the brief, for defendant City of New York.

The plaintiff State established no damage, of any consequence, to itself or to any interest which it might be deemed to represent.

The diversion from the non-navigable tributaries of the Delaware of the equivalent of 600 million gallons of water per day does not exceed the fair share of the State of New York in the waters of that river, under the doctrine of equitable apportionment.

The imposition of the Pennsylvania plan of release upon the taking by the defendant city of only 440 million gallons of water per day is inequitable and unjust.

The Special Master erred in recommending that the decree to be entered herein be not final.

The Delaware is not a navigable stream above Port Jervis.

Mr. George G. Chandler, with whom *Mr. William A. Schnader*, Attorney General of Pennsylvania, was on the brief, for the Commonwealth of Pennsylvania, intervener.

The interstate common law doctrine of equitable apportionment should govern the diversion and use of the

interstate waters of the Delaware and its tributaries; and under that doctrine the present New York taking is chargeable against its fair and equitable share in the waters.

The principle of the Pennsylvania plan of impounding and release should be adopted and applied to the present New York taking because it is the best plan and will best conserve and improve river conditions.

The Pennsylvania plan of impounding and release will protect all interests against substantial damage from the New York taking.

This Court should retain jurisdiction over the present cause in order to permit the future application by Pennsylvania for an appointment of a River Master and for an allocation to Philadelphia and Eastern Pennsylvania of 750 m. g. d. from the Pennsylvania tributaries of the upper Delaware River. Jurisdiction should also be retained to protect Pennsylvania interests against the possibility of adverse salinity in the lower Delaware resulting from the New York diversion.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity by which the State of New Jersey seeks to enjoin the State of New York and the City of New York from diverting any waters from the Delaware River or its tributaries, and particularly from the Neversink River, Willowemoc River, Beaver Kill, East Branch of the Delaware River and Little Delaware River, or from any part of any one of them. The other rivers named are among the headwaters of the Delaware and flow into it where it forms a boundary between New York and Pennsylvania. The Delaware continues its course as such boundary to Tristate Rock, near Port Jervis in New York, at which point Pennsylvania and New York

are met by New Jersey. From there the River marks the boundary between Pennsylvania and New Jersey until Pennsylvania stops at the Delaware state line, and from then on the river divides Delaware from New Jersey until it reaches the Atlantic between Cape Henlopen and Cape May.

New York proposes to divert a large amount of water from the above-named tributaries of the Delaware and from the watershed of that river to the watershed of the Hudson River in order to increase the water supply of the City of New York. New Jersey insists on a strict application of the rules of the common law governing private riparian proprietors subject to the same sovereign power. Pennsylvania intervenes to protect its interests as against anything that might be done to prejudice its future needs.

We are met at the outset by the question what rule is to be applied. It is established that a more liberal answer may be given than in a controversy between neighbors members of a single State. *Connecticut v. Massachusetts*, 282 U. S. 660. Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war. In a less degree, perhaps, the same is true of the quasi-sovereignties bound together in the Union. A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled

as best they may be. The different traditions and practices in different parts of the country may lead to varying results, but the effort always is to secure an equitable apportionment without quibbling over formulas. See *Missouri v. Illinois*, 200 U. S. 496, 520. *Kansas v. Colorado*, 206 U. S. 46, 98, 117. *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237. *Wyoming v. Colorado*, 259 U. S. 419, 465, 470. *Connecticut v. Massachusetts*, 282 U. S. 660, 670.

This case was referred to a Master and a great mass of evidence was taken. In a most competent and excellent report the Master adopted the principle of equitable division which clearly results from the decisions of the last quarter of a century. Where that principle is established there is not much left to discuss. The removal of water to a different watershed obviously must be allowed at times unless States are to be deprived of the most beneficial use on formal grounds. In fact it has been allowed repeatedly and has been practiced by the States concerned. *Missouri v. Illinois*, 200 U. S. 496, 526. *Wyoming v. Colorado*, 259 U. S. 419, 466. *Connecticut v. Massachusetts*, 282 U. S. 660, 671.

New Jersey alleges that the proposed diversion will transgress its rights in many respects. That it will interfere with the navigability of the Delaware without the authority of Congress or the Secretary of War. That it will deprive the State and its citizens who are riparian owners of the undiminished flow of the stream to which they are entitled by the common law as adopted by both States. That it will injuriously affect water power and the ability to develop it. That it will injuriously affect the sanitary conditions of the River. That it will do the same to the industrial use of it. That it will increase the salinity of the lower part of the River and of Delaware Bay to the injury of the oyster industry there. That it will injure the shad fisheries. That it will do the

same to the municipal water supply of the New Jersey towns and cities on the River. That by lowering the level of the water it will injure the cultivation of adjoining lands; and finally, that it will injuriously affect the River for recreational purposes. The bill also complains of the change of watershed, already disposed of; denies the necessity of the diversion; charges extravagant use of present supplies, and alleges that the plan will violate the Federal Water Power Act, (but see U. S. Code, Tit. 16, § 821,) interfere with interstate commerce, prefer the ports of New York to those of New Jersey and will take the property of New Jersey and its citizens without due process of law.

The Master finds that the above-named tributaries of the Delaware are not navigable waters of the United States at and above the places where the City of New York proposes to erect dams. Assuming that relief by injunction still might be proper if a substantial diminution within the limits of navigability was threatened, *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 709, he called as a witness General George B. Pillsbury, Assistant Chief of Engineers of the United States Army, who was well acquainted with the River and the plan, and who, although not speaking officially for the War Department, satisfied the Master's mind that the navigable capacity of the River would not be impaired. Of course in that particular as in some others New York takes the risk of the future. If the War Department should in future change its present disinclination to interfere, New York would have to yield to its decision, and the possible experiences of the future may make modifications of the plan as it now stands necessary in unforeseen particulars. This will be provided for in the decree. Subject to these considerations and to what remains to be said the New York plan as qualified here is reasonably necessary. Some plan must be formed and soon acted upon,

and taking into account the superior quality of the water and the other advantages of the proposed site over others, it at least is not arbitrary or beyond the freedom of choice that must be left to New York.

With regard to water power the Master concludes that any future plan of New Jersey for constructing dams would need the consent of Congress and of the States of New York and Pennsylvania and, though possible as a matter of engineering, probably would not pay. He adds that there is no such showing of a present interest as to entitle New Jersey to relief. *New York v. Illinois*, 274 U. S. 488, 490. *New Jersey v. Sargent*, 269 U. S. 328. We have spoken at the outset of the more general qualifications of New Jersey's rights as against another State. The Master finds that the taking of 600 millions of gallons daily from the tributaries will not materially affect the River or its sanitary condition, or as a source of municipal water supply, or for industrial uses, or for agriculture, or for the fisheries for shad. The effect upon the use for recreation and upon its reputation in that regard will be somewhat more serious, as will be the effect of increased salinity of the River upon the oyster fisheries. The total is found to be greater than New Jersey ought to bear, but the damage can be removed by reducing the draft of New York to 440 million gallons daily; constructing an efficient plant for the treatment of sewage entering the Delaware or Neversink (the main source of present pollution,) thereby reducing the organic impurities 85%, and treating the effluent with a germicide so as to reduce the *Bacillus Coli* originally present in the sewage by 90%; and finally, subject to the qualifications in the decree, when the stage of the Delaware falls below .50 c. s. m. at Port Jervis, New York, or Trenton, New Jersey, by releasing water from the impounding reservoirs of New York, sufficient to restore the flow at those points to .50 c. s. m. We are of opinion that the Master's report should

be confirmed and that a decree should be entered to the following effect, subject to such modifications as may be ordered by the Court hereafter.

1. The injunction prayed for by New Jersey so far as it would restrain the State of New York or City of New York from diverting from the Delaware River or its tributaries to the New York City water supply the equivalent of 440 million gallons of water daily is denied, but is granted to restrain the said State and City from diverting water in excess of that amount. The denial of the injunction as above is subject to the following conditions.

(a) Before any diversion shall be made an efficient plant for the treatment of sewage at Port Jervis, New York, shall be constructed and the sewage of Port Jervis entering the Delaware or Neversink Rivers shall be treated to such an extent as to effect a reduction of 85% in the organic impurities. And the effluent from such plant shall be treated with a chemical germicide, or otherwise, so that the *B. coli* originally present in the sewage shall be reduced by 90%.

Untreated industrial waste from plants in said town of Port Jervis shall not be allowed to enter the Delaware or Neversink Rivers, and the treatment of such industrial wastes shall be such as to render the effluent practically free from suspended matter and non-putrescent; and said treatment of sewage and industrial waste shall be maintained so long as any diversion is made from the Delaware River or its tributaries.

(b) At any time the stage of the Delaware River falls below .50 c. s. m. at Port Jervis, New York, or Trenton, New Jersey, or both (.50 c. s. m. being equivalent to a flow of 1535 c. f. s. at Port Jervis and 3400 c. f. s. at Trenton), water shall be released from one or more of the impounding reservoirs of New York City in sufficient volume to restore the flow at Port Jervis and Trenton to .50

c. s. m., provided, however, that there is not required to be released at any time water in excess of 30% of the diversion area yield, and the diversion area yield having been ascertained to be 2.2 c. s. m., the maximum release required shall be 30% of that amount, or .66 cubic feet per second per square mile of the areas from which water is diverted.

In determining the quantity of water to be released so as to add to the flow of the Delaware River, the Neversink River shall be treated as if it flowed into the Delaware River above Port Jervis, and the number of second feet of water released from the impounding reservoir on the Neversink River shall be added to the number of second feet of water released from other reservoirs, so as to determine whether the quantity of water, required by this decree to be released, has been released.

(c) That the State of New Jersey and the Commonwealth of Pennsylvania, through accredited representatives, shall at all reasonable times have the right to inspect the dams, reservoirs and other works constructed by the City of New York and to inspect the diversion areas and the inflow, outflow and diverted flow of said areas, and to inspect the meters and other apparatus installed by the City of New York and to inspect all records pertaining to inflow, outflow and diverted flow.

2. The diversion herein allowed shall not constitute a prior appropriation and shall not give the State of New York and City of New York any superiority of right over the State of New Jersey and Commonwealth of Pennsylvania in the enjoyment and use of the Delaware River and its tributaries.

3. The prayer of the intervener, Commonwealth of Pennsylvania, for the present allocation to it of the equivalent of 750 million gallons of water daily from the Delaware River or its Pennsylvania tributaries is denied without prejudice.

4. The prayer of the Commonwealth of Pennsylvania for the appointment of a river master is denied without prejudice.

5. This decree is without prejudice to the United States and particularly is subject to the paramount authority of Congress in respect to navigation and navigable waters of the United States, and subject to the powers of the Secretary of War and Chief of Engineers of the United States Army in respect to navigation and navigable waters of the United States.

6. Any of the parties hereto, complainant, defendants or intervenor, may apply at the foot of this decree for other or further action or relief and this Court retains jurisdiction of the suit for the purpose of any order or direction or modification of this decree, or any supplemental decree that it may deem at any time to be proper in relation to the subject matter in controversy.

7. The costs of the cause shall be divided and shall be paid by the parties in the following proportions: State of New Jersey 35 per cent., City of New York 35 per cent., State of New York 15 per cent., Commonwealth of Pennsylvania 15 per cent.

The CHIEF JUSTICE and Mr. JUSTICE ROBERTS took no part in the consideration or decision of this case.

SMOOT SAND & GRAVEL CORPORATION *v.*
WASHINGTON AIRPORT, INC.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
FOURTH CIRCUIT.

No. 678. Argued April 17, 1931.—Decided May 4, 1931.

1. The boundary line between Virginia and the District of Columbia is at high water mark on the Virginia side of the Potomac. *Mary-*